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No. 94-327

In the Supreme Court of the United States

OCTOBER TERM, 1994

STANLEY D. BEUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

ROBERT E. LINDSAY
ALAN HECHTKOPF
SCOTT A. SCHUMACHER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTIONS PRESENTED

1. Whether a conviction for willful violation of the Internal Revenue Code is subject to harmless-error analysis.

2. Whether the evidence considered by the jury was so overwhelming as to render an allegedly unconstitutional jury instruction harmless beyond a reasonable doubt.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-12) is unpublished, but the decision is noted at 21 F.3d 1116 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1994. A petition for rehearing was denied on May 23, 1994. Pet. App. 13. The petition for a writ of certiorari was filed on August 22, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Idaho, petitioner was convicted on eight counts of aiding or advising in the preparation of fraudulent or false tax documents, in violation of 26 U.S.C. 7206(2). Pet. App. 2-3. Petitioner was sentenced to four months' imprisonment, to be followed by a one-year term of supervised release. *Id.* at 3. He was also ordered to pay a fine of $10,000 and costs of prosecution of $11,958.92. *Ibid.* The court of appeals affirmed. *Id.* at 1-12.

1. In 1981, petitioner formed Shilo Automatic Sprinkler, Inc. (Shilo), a closely held corporation that was in the business of installing fire sprinkler systems in commercial buildings throughout the western United States. Pet. App. 2. Petitioner was a shareholder and manager of the corporation. Beus C.A. Br. 2-3. Employees of Shilo who worked in excess of 40 hours in a given week were paid for their overtime at straight rates, with no income tax withheld. *Ibid.* These overtime payments were recorded in Shilo's books not as wages, but as reimbursements for expenses. Under Treasury Regulations then in effect, reimbursements for expenses were not subject to income tax withholding. *Id.* at 2, 18.

Between 1985 and 1987, Shilo made quarterly filings with the Internal Revenue Service (IRS) on Form 941, the tax return for an employer. Pet. App. 2. Line two of Form 941 required the employer to report all wages and tips paid to an employee that were subject to withholding, plus other compensation. *Id.* at 4 n.3. The returns filed by Shilo did not show any of the overtime that was paid to Shilo's employees. *Id.* at 2. Petitioner directed that Shilo's bookkeepers prepare the returns in

that manner. *Id.* at 4-5. On September 18, 1987, the IRS notified petitioner that Shilo was the subject of a routine audit. *Id.* at 2. On October 12, 1987, Shilo began properly accounting for the overtime payments on its quarterly returns. *Ibid.*

2. At petitioner's request, the district court instructed the jury on petitioner's theory of defense—that Shilo did not need to report payments made for work performed in excess of 40 hours per week if they were reimbursement for "expenses." After charging the jury that the government had to prove beyond a reasonable doubt that "the total wages and tips subject to withholding plus other compensation portion of the Form 941 failed to include the amount of wages paid to employees for overtime" (Pet. App. 14), the court instructed the jury (*id.* at 15) that

> [petitioner] has presented evidence that the disputed sums at issue in this case were paid to employees as reimbursement for travel and travel-related business expenses incurred or to be incurred by them in the course of their employment with Shilo Automatic Sprinklers, Inc. Therefore, as part of your deliberations you must decide whether the disputed sums were in fact paid as bona fide travel expenses or as overtime wages as the government alleges.
>
> If you find that the disputed sums were * * * paid to the employees as bona fide reimbursement for travel-related business expenses incurred by them, you must enter a verdict of not guilty on all counts against [petitioner].
>
> If you find that the disputed sums were in fact paid to the employees as wages for overtime hours worked by them under the pretense of expenses, you must

> proceed in your deliberations. You must address each count separately, bearing in mind the elements which the Government must prove beyond a reasonable doubt which are set forth in [a previous instruction].

Petitioner objected that the instruction was narrower than the one he had proposed, but the district court overruled the objection. It explained in its order denying petitioner's post-trial motions that "[n]o reference was made to other types of business expenses [in the instruction] because the court simply could not justify instructing the jury that they could find that the disputed sums were advancements or reimbursements for expenses other than travel-related expenses. No evidence had been offered which would support such a claim." Gov't C.A. Br. 19.

3. The court of appeals affirmed. Pet. App. 1-12. The court rejected petitioner's claims that there was insufficient evidence to sustain the jury's guilty verdict and that the district court improperly modified his proposed jury instruction to limit it to travel and travel-related expenses. *Id.* at 3-9.

The court of appeals did find, however, that the district court's instruction on petitioner's theory of defense failed to state explicitly that the government was obliged to disprove petitioner's "affirmative" defense beyond a reasonable doubt and that the instruction therefore violated the Due Process Clause. Pet. App. 9-10. The court of appeals stated that, based upon the district court's instruction, the jury might have believed that it could convict petitioner even if the government had disproven petitioner's affirmative defense by an evidentiary standard less rigorous than proof beyond a reasonable doubt. *Id.* at 10.

The court determined, however, that the error was subject to harmless-error analysis under *Rose* v. *Clark*, 478 U.S. 570, 580 (1986). Pet. App. 10-11. Quoting *Yates* v. *Evatt*, 500 U.S. 391, 405 (1991), the court of appeals concluded that petitioner's convictions must be sustained if "the force of the evidence . . . *is so overwhelming* as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the [constitutional error]." Pet. App. 11 (emphasis added by court of appeals).

Analyzing the evidence, the court held that even if the district court had properly instructed the jury, the force of evidence disproving the affirmative defense was "so 'overwhelming' that the verdict would unquestionably have been the same." Pet. App. 11. The court noted that "[t]here is little if any evidence in the record" to support the affirmative defense, and that based upon the undisputed testimony of Shilo employees, as well as the admissions of petitioner, "the jury had no choice but to conclude that, even under the strictest possible standard, the disputed amounts were *not* 'expense allowances.'" *Id.* at 11, 12.

ARGUMENT

1. Petitioner contends (Pet. 6-11) that harmless-error analysis is unavailable in criminal tax cases when the trial court improperly instructs the jury with respect to the government's burden of proof. Contrary to petitioner's claim, the decision below is consistent with this Court's decisions and does not merit further review.

Harmless-error analysis is the norm in our system. See *Arizona* v. *Fulminante*, 499 U.S. 279, 306-310 (1991); *Rose* v. *Clark*, 478 U.S. 570, 579 (1986). This Court has accordingly held that "the taint of an unconstitutional burden-shifting jury instruction may be harmless."

Yates v. *Evatt*, 500 U.S. 391, 402 (1991); see *Pope* v. *Illinois*, 481 U.S. 497, 504 n.7 (1987) ("To the extent that cases prior to *Rose* may indicate that a conviction can never stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof, after *Rose*, they are no longer good authority.") (citation omitted).

In *Chapman* v. *California*, 386 U.S. 18, 24 (1967), the Court held that it must appear "beyond a reasonable doubt that the [constitutional] error complained of did not contribute to the verdict obtained." The Court explained in *Yates* that while "the issue under *Chapman* is whether the jury actually rested its verdict on [the] evidence * * * beyond a reasonable doubt, independently of the [constitutional error]," harmless-error analysis does not require a subjective inquiry into the jurors' minds. 500 U.S. at 404-405. Instead, a court must determine "whether the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the [constitutional error]." *Id.* at 405.

Petitioner argues (Pet. 11) that "[t]he application of the 'overwhelming evidence' analysis, as an objective analysis, is * * * directly in conflict with the requirement of subjective intent proof" required in federal tax prosecutions under *Cheek* v. *United States*, 498 U.S. 192, 202 (1991). Petitioner contends (Pet. 8) that a determination that an instruction was harmless based on overwhelming evidence is appropriate only in cases in which there is "a rock-solid state of objective facts based on clear physical evidence." Although the government must prove that a defendant willfully violated the tax laws in order to obtain a criminal conviction, objective

factors may be considered in deciding what the defendant subjectively believed or intended. See *Cheek*, 498 U.S. at 203-204 (jury may consider reasonableness of defendant's beliefs in determining state of mind). That inquiry is not fundamentally different from other issues involving proof of a defendant's state of mind. Just as those state-of-mind issues are subject to harmless-error analysis, see *Yates*, 500 U.S. at 410 (examining specific circumstances of victim's death in determining whether defendant had the intent to kill), so too is a defendant's intent in a tax prosecution. Cf. *United States* v. *Young*, 470 U.S. 1, 19-20 (1985) (declining to reverse conviction for specific-intent crime under plain-error analysis because of "the overwhelming evidence of [defendant's] intent to defraud").[1] The court of appeals was correct to apply harmless-error analysis in this case and petitioner points to no decisions of the courts of appeals to the contrary.

2. Petitioner next contends (Pet. 12-27) that the court of appeals erred in applying the two-step harmless-error analysis outlined by this court in *Yates*, 500 U.S. at 404-405, to the facts of his case. That fact-bound issue does not warrant further review.

a. Initially, contrary to the determination of the court of appeals, the instruction at issue did not impermissibly

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[1] Petitioner seems to argue (Pet. 7-8) that decisions of this Court limit harmless-error analysis to cases involving violent acts or use of weapons. Not only has petitioner failed to explain the constitutional basis for such a distinction, but his initial premise is erroneous. In *Pope* v. *Illinois*, *supra*, this Court determined that a conviction for selling obscene magazines could be "salvage[d] if the erroneous instruction [was] found to be harmless error," 481 U.S. at 501, and it remanded the case for an analysis of whether "the record developed at trial established guilt beyond a reasonable doubt," *id.* at 502-503 (quoting *Rose*, 478 U.S. at 579).

suggest that the government did not bear the burden to prove beyond a reasonable doubt that the payments were for employee business expenses. The jury was instructed (Pet. App. 15):

> [A]s part of your deliberations you must decide whether the disputed sums were in fact paid as bona fide travel expenses or as overtime wages as the government alleges.
>
> If you find that the disputed sums were * * * paid to the employees as bona fide reimbursement for travel-related business expenses incurred by them, you must enter a verdict of not guilty on all counts against [petitioner].
>
> If you find that the disputed sums were in fact paid to the employees as wages for overtime hours worked by them under the pretense of expenses, you must proceed in your deliberations. You must address each count separately, bearing in mind the elements which the Government must prove beyond a reasonable doubt which are set forth in Instruction No. 21.

There is no reasonable likelihood that the jury understood that instruction to imply that petitioner had the burden of proving that the payments were reimbursements for expenses. See *Estelle* v. *McGuire*, 112 S. Ct. 475, 482 & n.4 (1991); *Boyde* v. *California*, 494 U.S. 370, 380 (1990). Nor did the instruction create a presumption that petitioner was required to rebut. See *Yates*, 500 U.S. at 401-404. The instruction indicated to the jury that it was required to find that the payments were wages and not expense reimbursements. And the last sentence of the instruction reminded the jury to "bear[] in mind the elements which the Government

must prove beyond a reasonable doubt which are set forth in Instruction No. 21." Pet. App. 15.

Instruction No. 21 informed the jury, *inter alia*, that the second element of a violation of 26 U.S.C. 7206(2) was that the Form 941 was fraudulent as to a material matter, "specifically, that the total wages and tips subject to withholding plus other compensation portion of the Form 941 failed to include the amount of wages paid to employees for overtime." Pet. App. 14. Viewed in the context of that instruction, the subsequent instruction at issue here obviously was designed to guide the jury in its determination of whether the government had proven beyond a reasonable doubt that the unreported payments constituted wages and that the returns were therefore false. Accordingly, viewed in the context of the charge as a whole, see *Estelle*, 112 S. Ct. at 482; *United States* v. *Park*, 421 U.S. 658, 674 (1975); *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973), the challenged instruction maintained the burden of proof beyond a reasonable doubt on the government.

b. Even if, as the court of appeals determined, the instruction improperly shifted the burden of proof to petitioner, the court was correct in determining that the supposed error was harmless.

The court of appeals correctly found that there was overwhelming evidence that the payments to Shilo's employees were not reimbursements of expenses. It is undisputed that the payments at issue were made for work performed by the employees and were based on their hourly rates of pay. Pet. 4. Thus, the payments were remuneration for services and, regardless of what petitioner called them, were "wages" for withholding purposes. See 26 U.S.C. 3401(a); Treas. Reg. § 31.3401(a)-1(a)(2). Moreover, as the court of appeals observed, there was "little if any evidence in the record that [petitioner]

ever reimbursed his employees for *any* expenses—travel or otherwise." Pet. App. 11.

To the extent that the erroneous instruction had any bearing on the burden of proof with respect to the element of willfulness,[2] there was similarly overwhelming evidence that petitioner committed a "voluntary, intentional violation of a known legal duty." *Cheek*, 498 U.S. at 201. Petitioner was told by two of Shilo's bookkeepers that he was improperly accounting for the overtime employees worked. Pet. App. 4-5. One of the bookkeepers asked petitioner whether she should issue 1099 statements for Shilo's employees because the overtime did not appear on their W-2 statements. Petitioner refused. He told the bookkeeper that the IRS might get suspicious if Shilo's regular employees all had 1099 statements. *Id.* at 5. Petitioner also refused to include the overtime of one of Shilo's employees on the employee's W-2 or a 1099; he told the employee that if the overtime was shown on the W-2, petitioner would be caught. *Ibid.* Finally, shortly after being informed of a routine audit, petitioner began to report the overtime payments as wages. *Id.* at 2.

In light of that evidence, there was no likelihood that the verdict would have been different if the trial court had expressly instructed that the government was required to disprove petitioner's claim that the payments constituted expenses. Accordingly, the court of appeals

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[2] Petitioner appears to assume (Pet. 13 n.10, 14 & n.11) that the challenged instruction went to the elements of falsity and willfulness. Both the instruction offered by petitioner, Pet. App. 6 n.5, and the instruction given to the jury, *id.* at 15, however, concerned the issue of expenses and thus did not have any bearing on the burden of proof with respect to the element of willfulness.

correctly concluded that any instructional error was harmless.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

ROBERT E. LINDSAY
ALAN HECHTKOPF
SCOTT A. SCHUMACHER
Attorneys

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